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No. 94-715
In the Supreme Court of the United States
October Term, 1994

GEORGE NORRIS HALL,

Petitioner,

v.

HENRY GRAYSON,

Respondent.

# ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

# BRIEF OF RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

WHERE PETITIONER FILED AN UNSUCCESSFUL PETITION FOR A WRIT OF HABEAS CORPUS IN 1982 IN WHICH HE COULD HAVE ASSERTED A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BUT DID NOT, AND WHERE HE HAS NOT DEMONSTRATED EITHER PREJUDICE OR GOOD CAUSE FOR DELAY, WAS HIS SECOND PETITION FOR WRIT OF HABEAS CORPUS, FILED IN 1992, PROPERLY DISMISSED AS AN ABUSE OF THE WRIT?

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## STATEMENT OF THE CASE

Petitioner George Norris Hall (Petitioner), who is serving multiple life sentences in a Michigan prison for his 1975 jury convictions of first degree premeditated murder and felony murder, Mich. Comp. Laws 750.316, assault with intent to commit murder, Mich. Comp. Laws 750.82, and assault with intent to rob while armed, Mich. Comp. Laws 750.89, is seeking a writ of certiorari from the June 14, 1994 decision of the Sixth Circuit Court of Appeals, which affirmed the judgment of the District Court dismissing Petitioner's habeas petition as an abuse of the writ, and held:

> [1] Hall claims on appeal that the pronoun "we" in the last sentence quoted above [letter from Petitioner's co-defendant's Counsel, Mr. Palmer, to Petitioner's trial counsel, Mr. Bennett] refers to Bennett and Palmer, the two attorneys, and

insists that it constitutes proof of a concerted effort by the lawyers to help co-defendant McGill, to Hall's detriment. This argument is patently without merit. The obvious antecedents in the quoted paragraph are the author of the letter (McGill's attorney) and McGill himself. Moreover, there was no testimony at the evidentiary hearing in the district court that would refute this rather obvious interpretation of the 1979 letter to Eugene Bennett. Nor was there any other testimony to support Hall's claim that Bennett was ineffective in representing him in 1975. Hence, we conclude that the appellant has failed to demonstrate prejudice of the kind necessary to justify the filing of a subsequent petition for habeas corpus. App. to Pet. D-4

[2] Moreover, Hall has also failed to establish good cause for the delay in bringing his claim of ineffective assistance to the district court's attention. Clearly, the question of trial counsel's effectiveness could have been litigated in the earlier § 2254 action. On this point, the district court filed a thorough and well-reasoned memorandum opinion and order, which is fully supported by the record. App. to Pet. D-4

## STATEMENT OF FACTS

As the Sixth Circuit Court of Appeals stated, the facts concerning Petitioner's convictions are set forth in People v. Hall, 83 Mich. App. 632, 635-636; 239 N.W.2d 476 (1978), lv. den., 405 Mich. 826 (1979):

> Little dispute exists about the events leading up to defendant's conviction. Early in the morning of January 30, 1975, defendant was a participant in a card game at the home of John Fowler in East Lansing, Michigan. At about 3 a.m. defendant and Lawrence Chappell became involved in an altercation. Testimony at trial indicated that defendant produced a knife and threatened Chappell with violence. Eventually the parties returned to their card game and defendant left the building at 5 a.m. At that time only Lawrence Chappell, Charles Bovinette, N. A. Gaulden and John Fowler remained at Fowler's residence. Half an hour later, defendant went to the home of Karen Lawson and demanded the return of firearms he had left with her.
>
> Testimony regarding the actual murders was produced by N. A.

Gaulden, the lone survivor of the incident. At about 6 a.m., defendant and another man identified as Leo McGill returned to the home where the card game was being played. Defendant was refused his request to rejoin the game because he had no money. Defendant responded, "Never mind, it doesn't matter. We are taking all the money anyhow." At this point, defendant and codefendant McGill drew guns and ordered everybody to the floor. Gaulden then heard shots and saw Charles Bovinette fall, although he could not determine who had fired the shots. Next, he saw defendant shoot at Lawrence Chappell.

Defendant then told Gaulden to give him his money. After complying, he was ordered to lie on the floor. He then heard several shots and was struck twice by bullets, once in the side and once in the back. Shortly afterward, Gaulden called the police. On arrival, they found John Fowler and Lawrence Chappell dead. Charles Bovinette died on February 4, 1975.

Petitioner was represented at his trial by H. Eugene Bennett, an attorney for approximately seven years with criminal defense experience, including at

least one prior murder case defense. (January 19, 1990 Evidentiary Hearing Transcript, People v. Hall, Ingham County Circuit Court file number 75-25889-FY [EHT] testimony of H. Eugene Bennett [HEB] pp 23-24) Shortly after becoming Petitioner's trial counsel, Mr. Bennett arranged for Petitioner to be interviewed by a psychologist and a psychiatrist to determine whether Petitioner should raise an insanity and/or diminished capacity defense. (EHT [HEB] pp 9-10) Mr. Bennett also investigated a claim of right defense to the felony murder and robbery counts, based upon Petitioner's attempt to recover money the victims had obtained from him by allegedly cheating at cards. (EHT [HEB] pp 8-9; 19) Mr. Bennett prepared for Petitioner's trial for a num-

ber of months, invested numerous hours and determined that a temporary insanity/diminished capacity defense and a claim of right defense were appropriate and the only available defenses. (EHT [HEB] pp 32-33)

Leo McGill, who was tried with Petitioner on the same charges, was represented by Charles A. Palmer, and relied upon an alibi defense and mistaken identity defense. (EHT [HEB] pp 10, 14; Trial Transcript [TT] People v. Hall, Ingham County Circuit Court file number 75-25889-FY filed in Hall v. Grant, U.S.D.C. E.S. 82-60407, p 2)

A pretrial motion in limine was filed on behalf of Petitioner and McGill to suppress use of certain prior convictions for impeachment purposes in the

event they elected to testify. (EHT [HEB] p 11) The motion was discussed in chambers and the trial court indicated the ruling that would be made. However, the trial court did not rule on the motions on the record prior to jury selection, but took the motions under advisement to allow defense counsel to present additional arguments. Petitioner's trial counsel unequivocally stated that the court's informal ruling would effectively prevent Petitioner from testifying. (TT pp 15-19)

After the jury was sworn and a conference in chambers, but prior to opening statements, the trial court ruled on the motion in limine, and held inter alia, that the prosecutor could question Petitioner in the event he testified,

with respect to his convictions in 1962 for armed robbery, 1966 for attempted breaking and entering, and 1970 for armed robbery to attack his credibility as a witness, but could not refer to a conviction for an offense which did not involve moral turpitude or to two convictions committed while Petitioner was a youth. (TT pp 1336-1337, 1340-1345)

On September 24, 1975, after the prosecutor's opening statement, Petitioner's trial counsel made an opening statement and presented Petitioner's defenses of: 1) diminished capacity due to intoxication, lack of sleep and an injury; 2) intoxication; 3) temporary insanity or irresistible impulse which was stated to be consistent with Petitioner's amnesia concerning the identity

of the person with him and events at the scene of the crime; and, 4) a claim of right to return to recover his money. (TT pp 1354, 1372-1379)

Petitioner's last defense witness in his case in chief was Arnold S. Berkman, a psychologist, who testified that Petitioner was unable to resist the impulse to act as charged because of a mental defect. (TT Arnold S. Berkman pp 3311-3312; 3316) During his cross-examination, the prosecutor requested the psychologist's report. Petitioner's trial counsel opposed the request and suggested that the court review the psychologist's reports and notes in camera and then decide. (TT pp 3321-3326, 3331) The trial court's ruling was not made or disclosed,

directly or indirectly in the psychologist's subsequent cross-examination, on the trial record, and the significance of the ruling to Petitioner, and his decision not to testify was not revealed on the record in the trial court by Petitioner's trial counsel, until the January 19, 1990 evidentiary hearing. Then Petitioner's trial counsel testified: that Petitioner made statements to Dr. Berkman concerning McGill that were in the psychologist's report (EHT [HEB] p 11); that the trial court ruled that the psychologist's report was to be furnished to the prosecutor, and that the prosecutor could cross-examine the psychologist concerning the report, except for Petitioner's statements concerning McGill, unless Petitioner testified (EHT

[HEB] p 13); and, that the trial court also ruled that Petitioner could be cross-examined concerning his statements to Dr. Berkman, including his statements about McGill in the event he testified (EHT [HEB] p 13) Petitioner's trial counsel also testified on January 19, 1990, that the trial court's ruling allowing cross-examination of Petitioner concerning his statements to Dr. Berkman if he testified was not anticipated by Petitioner, Petitioner's trial counsel or anyone else including McGill and his trial counsel (EHT [HEB] p 13); and that he believed that if Petitioner had testified, the trial court's ruli[redacted] allowing cross-examination of Petitioner concerning his statements to Dr. Berkman would have resulted in the conviction of McGill (EHT [HEB] p 18).

After Dr. Berkman was excused and Petitioner rested, the following colloquy occurred between Petitioner's trial counsel, the Court, and Petitioner:

> MR. BENNETT (interposing): Your Honor, Mr. Palmer has generously deferred to me. I don't have a motion as such, but Mr. Hall and I have had a tremendous amount of discussion as to the merits and demerits of his taking the stand. He has indicated to me that he will reluctantly follow my advice in this regard.
>
> Just so the record is clear, I state "reluctantly", because he has feeling that he would still like to take the stand, but candidly he feels, on the other hand, that I, being the person more experienced in these matters, that he should follow my advice.
>
> By the same token, I think it is common knowledge that he has been under various tranquilizers and other drugs and I have advised him that ultimately this is his choice, whether he takes the stand or not.
>
> I feel, as an officer of this court, that at this time, after making these observations, that the

Court, if the Court desires to inquire further of me or Mr. Hall in this regard, that this might be the appropriate time to do it.

THE COURT: You say, Mr. Bennett, that the matter of Mr. Hall's testifying on his own behalf has been discussed between the two of you?

MR. BENNETT: Yes, Your Honor, on several occasions, at length.

THE COURT: And you have arrived at the decision jointly that Mr. Hall should exercise his right not to testify?

MR. BENNETT: Yes.

THE COURT: Is that correct, Mr. Hall?

RESPONDENT HALL: Yes. I will take my attorney's advice; he has advised me that I shouldn't.

THE COURT: Do you feel that Mr. Bennett has fully explored all the pros and cons of this particular incident, or would you prefer to discuss it further with him before irrevocably making that decision?

RESPONDENT HALL: I feel that he knows best.

THE COURT: All right.

Mr. Bennett?

MR. BENNETT: Thank you, Your Honor.

(TT pp 3413-3415)

Petitioner's defenses were submitted to the jury. The submission of Petitioner's diminished capacity defense was reviewed by the Michigan Court of Appeals in Petitioner's appeal of right, People v. Hall, 83 Mich. App. 632, 638, 639, and that Court also noted Petitioner's intoxication and insanity defenses. (EHT [HEB] pp 25, 33) The jury was given the following instruction on Petitioner's claim of right defense:

> The specific felonious intent required to be proved beyond a reasonable doubt has previously been explained to you. The law in this state further provides that if one in good faith believes that money which is demanded by him was his money and that he was entitled to its possession, he could not be guilty of either robbery or felony murder, because there would be no felonious intent.

> Therefore, I charge you, considering all of the evidence in this case, that if you find the accused, George Hall, went to the decedents home with the good faith intent of recouping his own money, and not the money of other persons, then the requisite felonious intent is absent and you must acquit George Hall of the charges of robbery and felony murder.

(TT pp 4011, 4040-4041)

On October 24, 1975, following a six-week jury trial, Petitioner was convicted of two counts of first degree premeditated murder, Mich. Comp. Laws 750.316, three counts of first degree felony murder, Mich. Comp. Laws 750.316, one count of second degree murder, Mich. Comp. Laws 750.317, one count of assault with intent to murder, Mich. Comp. Laws 750.82, and one count of assault with intent to rob while armed, Mich. Comp. Laws 750.89. On December 1, 1975, Peti-

tioner was sentenced to five non-parolable life terms on the two first degree murder convictions, two for the premeditated and three for felony murder. The remaining three convictions resulted in parolable life sentences. People v. Hall, 83 Mich. App. 632, 636, 637.

Petitioner was provided another attorney for his appeal of right, Joseph D. Reed, People v. Hall, 83 Mich. App. 632, 634. (EHT [HEB] p 26) Petitioner's appellate counsel raised a number of issues on appeal, and succeeded in having the life sentences for two felony murder convictions and the second degree murder conviction vacated. However, the conviction and other sentences were affirmed. People v. Hall, 83 Mich. App.

632, 637-638, 641. The Michigan Supreme Court denied Petitioner's application for leave to appeal in early 1979. People v. Hall, 405 Mich. 826 (1979).

Petitioner's trial counsel maintained contact with Petitioner, after the trial, and personally visited him. Petitioner's trial counsel received a letter from Leo McGill's trial counsel enclosing a brief from the trial in October 1979, which either he or Petitioner's appellate counsel furnished to Petitioner. (EHT [HEB] p 26)

In 1980, Petitioner filed, inter alia, a pro se delayed motion for a new trial, based upon new evidence, and a challenge to the trial court's ruling concerning the use of Petitioner's prior armed robbery convictions for impeach-

ment in the event Petitioner testified, which Petitioner claimed prevented him from testifying. The trial court denied Petitioner's amended motion and both the Michigan Court of Appeals and the Michigan Supreme Court denied Petitioner's applications for leave to appeal the trial court's decision. (Answer Exhibit A, pp 3-7)

On December 1, 1982, seven years after he decided not to testify shortly after the trial court's ruling that if he testified he would be subject to cross-examination concerning his statements to Dr. Berkman concerning McGill, and three years after Petitioner's trial attorney received the letter from Leo McGill's trial attorney, Petitioner commenced his first action for habeas

corpus in the United States District Court for the Eastern District of Michigan on December 1, 1982. Hall v. Grant, (E.D. Mich.) Civil Action No. 82-60407. Petitioner argued that the trial court's ruling concerning his prior armed robbery convictions violated state evidentiary law and prevented him from testifying. Both the District Court and the Sixth Circuit Court of Appeals held the trial court's ruling was not a constitutional violation. (Answer Exhibit A Memorandum Opinion, pp 6-7; Answer Exhibit B Slip Opinion 6-7)

On January 19, 1990, the trial court held an evidentiary hearing upon Petitioner's claim of ineffective counsel. Petitioner elected to rely solely upon

the testimony of his trial counsel, Mr. Bennett, and not to testify himself or to subpoena any other witnesses, even after the trial court refused to admit the October 18, 1979, letter from McGill's trial counsel, and informed Petitioner, Mr. Palmer should be called as a witness to testify to his mental impressions. (EHT pp 6; 18; 37-38) Mr. Bennett, who met twice with Petitioner to discuss his testimony at the hearing, (EHT [HEB] p 27) testified that he was sympathetic to Petitioner's cause (EHT [HEB] pp 26-37); that co-defendant McGill's trial counsel urged him not to have Petitioner testify, because he might place McGill at the crime scene, and that was one of a number of factors, including the use of prior armed robbery convictions for impeachment and Peti-

tioner's zombie-like appearance from medication that were the basis for his recommendations that Petitioner not testify; (EHT [HEB] pp 20, 27-28); that he had discussed with Petitioner the advantages and disadvantages of testifying and they concluded that Petitioner would not testify (EHT [HEB] p 30); that he never informed the trial court of the requests of McGill's trial counsel (EHT [HEB] p 29); that Petitioner was competent to stand trial (EHT [HEB] p 28); and, that at the time of trial he was convinced that his advice that Petitioner not testify was appropriate (EHT [HEB] pp 31-32); but that, based on the fact that Petitioner was convicted, he now believed that a different strategy would have been better (EHT [HEB] pp 31-32).

On May 10, 1990, the trial court entered an Opinion and Order denying Petitioner's motion for a new trial, which applied the standard in Strickland v. Washington, 466 U.S. 668 (1984), and provides in pertinent part:

> In the instant case, Defendant's claim rests on the fact that he chose, upon advice of counsel, not to testify. Defendant's decision not to testify preserved his fifth amendment right to refuse to incriminate himself with his own testimony. Further, Defendant's decision not to testify protected him from being impeached by his prior conviction.
>
> Defendant alleges that he was unable to tell his side of the story because he was following counsel's advice not to take the stand. However, the record shows that Defendant was able to place his theory of the case before the jury through expert witnesses and counsel. The decision not to testify was a matter of strategy suggested by defense counsel and employed by Defendant which does not render defense counsel's performance ineffective in this case.
>
> In considering all the circumstances, Counsel did not make errors

> so serious that Counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Had Defendant testified, he would have been subject to impeachment by the Prosecutor. Counsel's strategy to decline to place Defendant on the stand was a sound strategy. Defendant has shown no error by his trial attorney.
>
> Therefore, Defendants (sic) allegation if (sic) ineffective counsel is without any factual merit.

(Answer Exhibit C, Opinion and Order, May 10, 1990, p 2)

On February 21, 1992, Petitioner filed his second federal petition for writ of habeas corpus, based on ineffective assistance of counsel.

On February 23, 1993, the District Court entered a Judgment dismissing Petitioner's District Court action and a Memorandum Opinion and Order, which holds:

This Court agrees that Petitioner has failed to show that any objective factor external to the defense impeded presentation of his claim. Petitioner's ineffective assistance of counsel claim was available to Petitioner when he filed his first petition. Petitioner knew that he had not testified at his trial. He knew that his attorney had unsuccessfully sought to have evidence of his prior convictions suppressed and consequently advised him not to testify. If Petitioner did not ask his trial attorney for a full explanation of the reasoning behind this advice during the trial, no objective factor external to the defense is responsible. And later, when preparing his first habeas petition, Petitioner could have inquired of his trial counsel as to why he had recommended that Petitioner not testify. The record clearly shows that trial counsel Bennett cooperated with this inquiry after Petitioner's first habeas petition was denied in preparation for Petitioner's subsequent second state appeal and second habeas petition. Because Petitioner cannot show that an objective factor external to the defense prevented him from raising his ineffective assistance of counsel claim in his first habeas petition, Petitioner has failed to demonstrate cause for not raising this claim in his first petition. Accordingly, Petitioner's petition is an abuse of the writ.

Because Petitioner has abused the writ by failing to present his ineffective assistance of counsel claim in his first habeas petition, this Court only may grant Petitioner habeas relief on this claim if failure to do so would result in a fundamental miscarriage of justice. A fundamental miscarriage of justice is an extraordinary situation where a constitutional violation has probably caused or is likely to have caused the conviction of a person innocent of the crime charged. Murray v. Carrier, 477 U.S. at 485; McCleskey v. Zant, 111 S. Ct. at 1470; Bagby v. Sowers, 894 F.2d 792, 795 (6th Cir. 1990) (en banc).

Here, evidence was presented that immediately before the killings, Petitioner retrieved his guns. A surviving eyewitness to the murders testified that he saw and heard Petitioner shoot him and least (sic) one other victim after Petitioner announced the robbery. There is no reason to believe that Petitioner is innocent of the crime of which he was convicted.

Furthermore, there was no constitutional violation at Petitioner's trail. Petitioner's trial counsel followed the reasonable strategy of avoiding Petitioner's impeachment with prior armed robbery convictions in a multiple murder trial arising out an (sic) armed robbery where an eyewitness identified Petitioner as one of the

> killers. The strategy did not result in an acquittal, but there was no constitutional violation. Therefore, this Court concludes that the present case is not an instances where "a constitutional violation probably has caused the conviction of one innocent of the crime." McCleskey v. Zant, 111 S. Ct. at 1470.

App. to Pet. A-9 to A-11.

The Sixth Circuit Court of Appeals' decision affirming the District Court's dismissal of Petitioner's second habeas petition as an abuse of the writ provides in pertinent part:

> As noted in the district court's memorandum opinion, the single issue presented by this appeal is whether Hall's "defense at trial was sabotaged by a conflict of interest" on the part of his trial attorney. Hall had been indicted along with a co-defendant, Leo McGill. Each defendant had his own attorney, and both sought a severance in the trial court, claiming inconsistent defenses. (Hall's counsel intended to rely on the alternative defenses of insanity and claim of right; McGill's defense was based on mistaken identity.) The trial court

apparently determined that the defenses were not inconsistent, but "merely different," and denied severance.

Hall and McGill were thereafter tried jointly, with mixed results; Hall was convicted of the attempted robbery and murder of various members of a poker playing group of his acquaintances; McGill was acquitted. The crux of Hall's current complaint concerns his decision not to testify in his own behalf at trial, which decision he now claims was urged on him by his counsel, Eugene Bennett, in order to protect the co-defendant, McGill. As a result, Hall insists, he was prevented from presenting a credible claim-of-right defense and was therefore wrongfully convicted on three counts of felony murder. (Claim of right would not, of course, be a valid defense to two other counts of premeditated murder, for which Hall was also convicted and sentenced to two terms of "non-parolable" life imprisonment.)

The trial transcript shows, however, that Bennett advised Hall not to testify principally because of his client's prior convictions for armed robbery, which the trial court had ruled admissible for impeachment purposes, and also because, in Bennett's words, Hall "was taking medication and he was a little bit zombie-like" during trial.

Hall claims that it was not until 1988 or 1989 that he came into possession of a letter written to his trial attorney by Charles Palmer, McGill's attorney, in 1979. The letter accompanied a copy of a brief "filed in the Hall-McGill case regarding separate trials," which McGill's attorney thought "m[ight] be helpful to George [Hall] in his appeal." Attorney Palmer continued:

> As far as my recollections of the trial go, I clearly remember asking you on a number of occasions to keep George Hall off the stand. I thought it would be harmful to Leo's case. I talked to Leo about it too, and I believe that he talked to George Hall. Leo and I tried everything we could think of to convince you and George to keep George off the stand. I thought that Leo would surely lose if George testified. If George said it wasn't Leo with him, then Wilson would have asked who it was. Since George wouldn't tell, it would have hurt Leo's case. If George testified that he didn't remember who it was, that would also look like he was protecting Leo. Obviously, if George had testified that Leo was with him, then Leo would have been convicted. In any case, Leo would have lost if George testified. We didn't want that and did everything we could to keep George from testi-

fying since the trials were together.

Hall claims on appeal that the pronoun "we" in the last sentence quoted above refers to Bennett and Palmer, the two attorneys, and insists that it constitutes proof of a concerted effort by the lawyers to help co-defendant McGill, to Hall's detriment. This argument is patently without merit. The obvious antecedents in the quoted paragraph are the author of the letter (McGill's attorney) and McGill himself. Moreover, there was no testimony at the evidentiary hearing in the District Court that would refute this rather obvious interpretation of the 1979 letter to Eugene Bennett. Nor was there any other testimony to support Hall's claim that Bennett was ineffective in representing him in 1975. Hence, we conclude that the appellant has failed to demonstrate prejudice of the kind necessary to justify the filing of a subsequent petition for habeas corpus.

Moreover, Hall has also failed to establish good cause for the delay in bringing his claim of ineffective assistance to the District Court's attention. Clearly, the question of trial counsel's effectiveness could have been litigated in the earlier § 2254 action. On this point, the District Court filed a thorough and well-reasoned memorandum opinion and order, which is fully supported by the record.

> For the reasons given above and on the basis of the District Court's opinion, we AFFIRM the judgment below.

App. to Pet. D-2 to D-4.

## REASONS FOR DENYING THE WRIT

### THE PETITION PRESENTS NO IMPORTANT UNSETTLED QUESTION OF FEDERAL LAW AND THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER UNITED STATES COURTS OF APPEALS.

Petitioner does not and cannot establish that this case involves important unsettled questions of federal law or that the decision below conflicts with decisions of this Court or other United States Courts of Appeals. This case merely involves the application of established law to the facts of record to determine whether Petitioner has demonstrated cause and actual prejudice or

a fundamental miscarriage of justice to allow habeas review of his abusive claim.

**THE DISMISSAL OF PETITIONER'S SECOND HABEAS PETITION AS AN ABUSE OF THE WRIT WAS CLEARLY CORRECT, BECAUSE PETITIONER FAILED TO DEMONSTRATE CAUSE AND ACTUAL PREJUDICE OR A FUNDAMENTAL MISCARRIAGE OF JUSTICE.**

The District Court correctly rejected Petitioner's unsubstantiated claim that the factual basis for his ineffective assistance of counsel claim was not reasonably available to him at the time of his first petition under the standard in McCleskey v. Zant, 499 U.S. 467, 497-502 (1991).

Petitioner knew he did not testify. Petitioner knew his trial attorney had unsuccessfully moved to suppress use of his prior armed robbery convictions for

impeachment purposes. Petitioner knew his trial attorney recommended that he not testify. Prior to his decision not to testify, Petitioner knew that if he testified, he would be cross-examined concerning McGill's participation in the crime and any prior statements to his psychologist concerning McGill's participation. (EHT, p 13) Petitioner must have known that McGill and McGill's trial counsel would prefer that Petitioner not testify under the circumstances. If Petitioner did not ask his trial counsel for a full explanation of the reasons for the advice not to testify, particularly when the trial court offered Petitioner the opportunity to such an explanation before deciding whether to testify (TT, pp 3414-3415), no objective factor external to the

defense was responsible for Petitioner not discovering during his trial, and prior to deciding not to testify, the factual basis for his ineffective assistance of counsel claim. Petitioner clearly had this knowledge prior to filing his first petition for habeas corpus on December 1, 1982.

There is no factual basis in the record for Petitioner's claim that he did not receive a copy of Palmer's October 18, 1979 letter until 1988 or that his trial counsel, Bennett, did not communicate with him from the time of his conviction to 1987. Petitioner did not testify to those facts. Nor did his trial counsel, the only witness Petitioner presented in support of his claim of ineffective assistance of trial coun-

sel at the January 19, 1990 Evidentiary Hearing. In fact, Petitioner's claim is contrary to the record.

Petitioner's trial counsel maintained contact with Petitioner after the trial and personally visited him (EHT [HEB] p 9). Petitioner's trial counsel also apparently solicited a trial brief and information from McGill's trial counsel for Petitioner, which resulted in the October 1979 letter, prior to Petitioner's first application for a writ of habeas corpus. Either Petitioner's trial counsel or Petitioner's appellate counsel furnished Petitioner the October 1979 letter. (EHT [HEB] p 26) Petitioner's trial counsel cooperated with Petitioner's preparation for the evidentiary hearing upon his second

motion for a new trial in the trial court. (EHT [HEB] p 27) Petitioner could have discussed trial counsel's advice with his trial counsel when preparing his first application. Therefore, the District Court concluded that Petitioner had failed to establish that an objective factor external to the defense prevented him from raising his ineffective assistance of counsel claim in his first petition, and had failed to establish cause for not raising the claim in his first application. The Sixth Circuit Court of Appeals held the District Court's determination that Petitioner had failed to establish cause was fully supported by the record and that Petitioner's ineffective assistance of trial counsel claim could have been litigated in Petitioner's first habeas action.

The District Court concluded that this case did not involve an extraordinary situation where a constitutional violation has probably or is likely to have caused the conviction of a person innocent of the crime charged required for the fundamental miscarriage of justice exceptions, Murray v. Carrier, 477 U.S. 478 (1986); McCleskey v. Zant, 111 S. Ct. at 1470, because:

> Here, evidence was presented that immediately before the killings, Petitioner retrieved his guns. A surviving eyewitness to the murders testified that he saw and heard Petitioner shoot him and (sic) least one other victim after Petitioner announced the robbery. There is no reason to believe that Petitioner is innocent of the crime of which he was convicted.
>
> Furthermore, there was no constitutional violation at Petitioner's trial. Petitioner's trial counsel followed the reasonable strategy of avoiding Petitioner's impeachment with prior armed robbery convictions in a multiple murder trial arising out an (sic) armed

> robbery where an eyewitness identified Petitioner as one of the killers. The strategy did not result in an acquittal, but there was no constitutional violation. Therefore, this Court concludes that the present case is not an instance where "a constitutional violation probably has caused the conviction of one innocent of the crime." McCleskey v. Zant, 111 S. Ct. at 1470.

App. to Pet. A-11.

Petitioner refers to various post-conviction affidavits concerning the actions of his co-defendant McGill and another person, Aubin Hutchens, who is now deceased, at the crime scene, which were at issue as alleged newly discovered evidence in Petitioner's first habeas action. The District Court and the Sixth Circuit Court of Appeals in Petitioner's first habeas action held those affidavits were not a basis for habeas relief, and this Court denied

Petitioner's application for writ of certiorari in Hall v. Grant, No. 85-6485. Petitioner's "other guy" affidavits which are, at least, as questionable as the "other guy" affidavits in Herrera v. Collins, 506 U.S. ___; 113 S. Ct. ___; 122 L. Ed. 2d 203 (1993), do not constitute a colorable showing of factual innocence to allow consideration of his otherwise barred abusive claim of ineffective assistance of trial counsel. Nor does Petitioner's abusive alleged ineffective assistance of trial counsel claim constitute a constitutional violation under either the actual prejudice or fundamental miscarriage of justice standards.

The Sixth Circuit Court of Appeals correctly rejected Petitioner's argument

that he demonstrated actual prejudice with his abusive ineffective assistance of counsel claim, because Palmer's October 18, 1979 letter, the basis for Petitioner's alleged conflict of interest claim, does not show Petitioner's trial counsel was representing McGill to the detriment of Petitioner, and neither does Petitioner's trial counsel's testimony, the only other evidence presented by Petitioner to support his claim. The District Court correctly concluded that Petitioner had not demonstrated a constitutional violation under the fundamental miscarriage of justice standard for the same reasons.

Petitioner's trial counsel's advice that Petitioner not testify, after Dr. Berkman's testimony, is strongly pre-

sumed to be an exercise of reasonable professional judgment, was clearly not outside the wide range of professionally competent assistance, and is not subject to second guessing, because of Petitioner's conviction. Strickland v. Washington, 466 U.S. 668, 689, 690 (1983). The mere fact that Petitioner's trial counsel considered the requests or urgings of McGill's trial counsel that Petitioner not testify with all the other known and obvious factors to be considered, does not establish that Petitioner's trial counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected" Petitioner's trial counsel's performance. Cuyler v. Sullivan, 446 U.S. 335, 348, 350 (1980); Strickland v. Washington, supra. Thus,

Petitioner's conflict of interest claim is clearly unfounded and without any factual or legal basis.

The lower courts' conclusions that there was no constitutional violation is clearly correct. When Petitioner made his decision not to testify, Petitioner's diminished capacity, intoxication, temporary insanity and claim of right defenses had been presented through other witnesses; Petitioner was competent, but had a zombie-like appearance from medication (EHT [HEB] pp 27-28); Petitioner knew his prior armed robbery convictions would be used in cross-examination for impeachment purpose; Petitioner knew he would be waiving his right to incriminate himself; and Petitioner knew he would be

subject to cross-examination concerning his statements to his psychologist and psychiatrist, including his statements about McGill, which could possibly damage their credibility and his credibility. Clearly, it was a reasonable trial strategy for Petitioner to avoid the risks of testifying as the District Court ruled.

The dismissal of Petitioner's second application for a writ of habeas corpus as an abuse of the writ was clearly correct, because Petitioner failed to demonstrate cause for not raising his ineffective assistance of counsel claim in his first application, and actual prejudice or a fundamental miscarriage of justice.

## CONCLUSION

Wherefore, Respondent urges this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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